Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SPYRIDON ARMENIS,
Petitioner,
v.
ALBERT CRAMER,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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Pro se

QUESTIONS PRESENTED

The following questions are presented by the Petitioner:

1. Did the Eleventh Circuit Court of Appeals properly apply summary judgment standards in this action?

2. Should this Court reconsider or clarify its decisions in *Matsushita Elec. Indus. Co. v. Zenith Radio*, 106 S.Ct. 1348 (1986); *Anderson v. Liberty Lobby Inc.*, 106 S.Ct. 2505 (1986); and *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986)?

PARTIES BELOW

Petitioner Spyridon Armenis was the plaintiff-appellant in the court below. Respondent Albert Cramer was defendant-appellee in the court below.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES BELOW ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 8

I. THE ELEVENTH CIRCUIT COURT OF APPEALS DID NOT PROPERLY APPLY SUMMARY JUDGMENT STANDARDS IN THIS ACTION 9

II. THE TRILOGY OF DECISIONS IN 1986 ON SUMMARY JUDGMENT HAVE SOWN SEEDS OF CONFUSION IN THE LOWER COURTS AND NEED TO BE RECONSIDERED OR CLARIFIED 11

CONCLUSION 19

APPENDIX 1a

TABLE OF AUTHORITIES

Cases Page

Anderson v. Liberty Lobby, Inc.
106 S.Ct. 2505 (1986) 8,13,15,16
Baylis v. Travelers' Ins. Co., 5 S.Ct. 494 (1885) 18
Capital Traction Co. v. Hof, 19 S.Ct. 580 (1899). 18
Celotex Corp. v. Catrett
106 S.Ct. 2548 (1986) 8,9,13,14,16,17
Croxen v. U.S. Chemical Corp. of Wisconsin
558 F.Supp. 6, 7 (N.D. Iowa W.D. 1982) 19
Daubert v. Merrell Dow Pharmaceuticals, Inc.
113 S.Ct. 2786 (1993). 9,14
Fineman v. Armstrong World Industries, Inc.
980 F.2d 171, 183 (3rd Cir. 1992) 18
Fountain v. Filson, 69 S.Ct. 754, 756 (1949). 10
Galloway v. United States,
63 S.Ct. 1077, 1090 (1943) 18
Grady v. Corbin, 110 S. Ct. 2084 (1990). 13
In re Joint Eastern and Southern Dist. Asbestos Lit.
52 F.3d 1124 (2nd Cir. 1995). 9,14
Kohlheim v. Glynn County, Ga.
915 F.2d 1473, 1478 (11th Cir. 1990) 10
Mastushita Elec. Indus. Co. v. Zenith Radio
106 S.Ct. 1348 (1986) 8,13,15
New York Times v. Sullivan, 84 S.Ct. 710 (1964) 15
Parks v. City of Warner Robins, Ga.,
43 F.3d 609, 612-13 (11th Cir. 1995) 7
Poller v. Columbia Broadcasting System
82 S.Ct. 486, 488 (1962) 10
Slocum v. New York L. Ins. Co.
33 S.Ct. 523, 532 (1912) 18

TABLE OF AUTHORITIES (continued)

Cases Page

South Carolina v. Gathers
109 S.Ct. 2207, 2218 (1989) 12
United States v. Dixon, 113 S.Ct. 2849 (1993) 13

Constitution of the United States
Seventh Amendment 2,17,18

Statutes
Federal Rule of Civil Procedure 56 2,10,11

Other Authorities
Boudin, *Government by Judiciary*, Volume II
pages 287-288 (1932) 13
D'Amato, *The Ultimate Injustice: When the Court Misstates the Facts*
11 Cardozo Law Review 1313 (1989) 11
Fallon, *Foreward: Implementing the Constitution*
111 Harvard L.Rev. 56 (1997) 9
Issacharoff and Lowenstein, *Second Thoughts About Summary Judgment*
100 Yale Law Journal 73 (1990) 17
McFadden, *Trial by Summary Judgment? Erosion of the Seventh Amendment*,
Trial p. 64 (July 1996) 17
New York Times Quarterly Index, Jul-Sep 1997
p. 413 14
New York Times Index 1994, p. 1278 14
New York Times Index 1987, p. 1393 13

TABLE OF AUTHORITIES (continued)

Other Authorities Page

Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis* 105 Yale Law Journal 2031 (1996) 19

Plucknett, *Concise History of the Common Law* p. 310 (1956). 10

Segal and Spaeth, *The Influence of Stare Decisis on the Votes of the United States Supreme Court Justices*, 40 American Journal of Political Science 971(1996) 13

The Wall Street Journal Index - Corporate News 1996, p. 1097 14

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---

PETITION FOR A WRIT OF CERTIORARI

Spyridon Armenis, on behalf of himself, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, filed on January 20, 1998, denying petitioner a jury trial and a good-faith determination of the *facts* in this case.

OPINIONS BELOW

The Court of Appeals' unreported opinion is reproduced on pages 1a-2a of the Appendix to this certiorari petition (hereafter "Pet. App."). The unreported District Court Order is reproduced at Pet. App. 12a-27a. The Magistrate's Report and Recommendation is reproduced at Pet. App. 3a-11a.

JURISDICTIONAL STATEMENT

The Court of Appeals opinion was entered on January 20, 1998. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Seventh Amendment to the United States Constitution and Federal Rule of Civil Procedure 56.

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Federal Rule of Civil Procedure 56 provides:

> (a) For Claimant.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion.

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a

genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable.

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATEMENT OF THE CASE

Petitioner is a pro se litigant who attempted to take the issues of breach of contract, breach of fiduciary duty, and interference with business relationships in a real estate development project to a jury under the diversity jurisdiction statute, 28 U.S.C. § 1332.

The original complaint was filed on June 6, 1994. The gist of the complaint is that:

A. Respondent Cramer breached a written contract by, among other actions, using a veiled purchaser for part of the properties involved in the dispute.

B. Respondent Cramer violated that trust relationship by entering into secret negotiations with third parties

C. Respondent Cramer filed a spurious legal action with the intention of interfering with Petitioner Armenis' other development projects and to defame Petitioner Armenis.

On June 20, 1995, master docket entry no. 68, Magistrate Judge Donald P. Dietrich, in his Report and Recommendation, recommended that Respondent Cramer's motion to strike punitive damage claims be granted, recommended that the motion to dismiss be granted without prejudice as to Count II, and that otherwise the motion should be denied.

On September 11, 1995, master docket entry no. 71, federal district court judge Anne C. Conway approved/disapproved in part the Magistrate's Report and Recommendation and gave the Petitioner until September 25, 1995 to amend his complaint, which was amended by Petitioner and submitted on September 25, 1995, master docket entry no. 73.

On April 25, 1996, master docket entry no. 81, Respondent Cramer filed a motion for final summary judgment.

On April 25, 1996, master docket entry no. 84, Respondent Cramer filed his affidavit.

On August 8, 1996, master docket entry no. 109, Judge Conway set jury trial for March 2, 1998.

On November 18, 1996, master docket entry no. 112,

Judge Conway granted Respondent's motion for summary judgment. This motion was apparently based on such principles of law as:

1. The judge (not the jury) decides what constitutes a genuine issue of fact. (See Order, II. Summary Judgment Standard, Pet. App. 13a.)

2. "[T]he Court accepts as undisputed the facts as stated by [Respondent] Cramer, except as *modified* by the *Court* herein." (See Order, Pet. App. 14a note 2) (emphasis added).

3. The "Court herein" then modified the facts in that the land to be purchased was substituted with "another parcel" when in fact it was the *same land*. (See Order, Pet. App. 16a, paragraph 4.)

4. Other untruthful statements are found in the Order, to wit:

A. ". . . as had been agreed." (See Order, Pet. App. 18a, paragraph 1.)

B. "Cramer never implemented 'Armenis' time-share concept'. . ." (See Order, Pet. App. 18a, paragraph 2.)

5. The Court noted " . . . that Florida law concerning, the duration of fiduciary duties appears unsettled." (See Order, Pet. App. 24a note 8.)

6. The Court appears to have conducted trial by affidavit. (See Order, Pet. App. 25a, last paragraph.)

The Eleventh Circuit Court of Appeals then affirmed the district court's Order in a one-page, three paragraph opinion that looks suspiciously like a summary prepared by staff attorneys, in which the lower court decision was simply condensed and parroted. One of the two cases cited by the appellate court, *Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 612-13 (11th Cir. 1995), does state that:

> We review the district court's grant of summary judgment *de novo*, applying the *same* legal standards used by the district court.

What was not addressed is whether those legal standards were *wrong*.

On November 27, 1996, master docket entry no. 115 and 116, Petitioner Armenis attempted to bring the fraud in this action to the attention of the district court.

On December 18, 1996, master docket entry no. 130, Petitioner Armenis moved to recuse Judge Conway and to reconsider her rulings.

On January 9, 1997, master docket entry no. 133, Petitioner's motions were denied.

Petitioner then timely appealed on January 27, 1997, master docket entry no. 134.

REASONS FOR GRANTING THE WRIT

The Writ must be granted because the Eleventh Circuit's decision represents an unprecedented encroachment on Petitioner's constitutional right to a jury trial. The summary judgment ruling in the district court relied on spurious affidavits, an issue ignored by the Eleventh Circuit Court of Appeals.

This Court should also reconsider or clarify its decisions on its 1986 trilogy of summary judgment cases, *Mastushita Elec. Indus. Co. v. Zenith Radio*, 106 S.Ct. 1348 (1986), *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986), and *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986), which as the dissenters in those cases pointed out, were bound to sew confusion in the lower courts.

As an example of this confusion, compare the opinions in

Celotex Corp. v. Catrett, supra, (an asbestos case) with *In re Joint Eastern & Southern Dist. Asbestos Lit.*, 52 F.3d 1124 (2nd Cir. 1995)(an asbestos case), which relied on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993) for the summary judgment principle to be applied.

The Second Circuit appears to have ignored this Court's holdings in its 1986 trilogy, though the facts (if not the legal principles discussed) in *Celotex Corp. v. Catrett*, supra, and *In re Joint Eastern & Southern Dist. Asbestos Lit.*, supra, are almost mirror images of each other.

"A crucial mission of the [Supreme] Court is to *implement* the Constitution successfully." Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 Harvard L.Rev. 56, 57 (1997) (emphasis in original).

I. THE ELEVENTH CIRCUIT COURT OF APPEALS DID NOT PROPERLY APPLY SUMMARY JUDGMENT STANDARDS IN THIS ACTION.

The suggestion of rehearing en banc, Pet. App. 28a-36a, prepared with the assistance of Professor Judith Resnik (Yale Law School), amply illustrates [some of] the problems arising from the appellate panel's ruling in this action, see Pet. App. 29a.

What could not possibly have been known to Professor Resnik at the time is that Eleventh Circuit appellate panels *routinely* do *not read* pro se appellate briefs. The practice in the Eleventh Circuit is as follows:

The Eleventh Circuit has twelve (12) appellate judges and forty-seven (47) staff attorneys. Pro se briefs are read by the staff attorneys who then *summarize* their contents, said *summary* then being read by the appellate judges who make the decision. This information did not become public until

March 23, 1998 at a public hearing in Atlanta, Georgia by the Commission on Structural Alternatives for the Federal Courts of Appeals with the Honorable Byron White, presiding. Petitioner is in the process of attempting to obtain transcripts of this hearing.

I.e., apparently the Eleventh Circuit Court of Appeals, like the English Court of Common Pleas in the fourteenth century, has decided that it "doesn't have time for the affairs of peasants." Plucknett, *Concise History of the Common Law*, p. 310 (1956).

The summary judgment standards applied in this action were deficient in the following areas as well:

A. Summary judgment may be given, under Rule 56, *only* if there is no dispute as to *any* material fact. *Fountain v. Filson*, 69 S.Ct. 754, 756 (1949). For the principles that *should* have been applied in the Eleventh Circuit Court of Appeals, compare *Kohlheim v. Glynn County, Ga.*, 915 F.2d 1473, 1478 (11th Cir. 1990)("sufficient advance notice") with the en banc petition of Professor Resnik.

> Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case "show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed.Rules Civ.Proc., 28 U.S.C.A. This rule authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . .
>
> *Poller v. Columbia Broadcasting System*, 82 S.Ct. 486, 488 (1962) (citation omitted).

B. Petitioner Spyridon Armenis, on more than one occasion, attempted to bring to the attention of the lower court that the main affidavits submitted by the Respondent are *spurious*.

The problems created by spurious affidavits are simply insurmountable when a district court judge relies on those affidavits to make her ruling. See Anthony D'Amato, *The Ultimate Injustice: When the Court Misstates the Facts*, 11 Cardozo Law Review 1313 (1989).

When relying upon a spurious affidavit in a summary judgment motion the court must, not may, misstate the facts. This is the exact opposite of what is supposed to happen. An affidavit made in bad faith is a contempt of court, Federal Rule of Civil Procedure 56(g), not a reason for entering summary judgment.

II. THE TRILOGY OF DECISIONS IN 1986 ON SUMMARY JUDGMENT HAVE SOWN SEEDS OF CONFUSION IN THE LOWER COURTS AND NEED TO BE RECONSIDERED OR CLARIFIED.

There are two (2) views concerning unwise decisions issued by the United States Supreme Court.

The first view is that the members of the United States Supreme Court recognize the errors of their predecessors and take steps to correct them.

> In any case, I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face. With some reservation concerning decisions that have become so embedded in our system of government that return is no longer possible (a

> description that surely does not apply to *Booth*), I agree with Justice Douglas: "A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it." Douglas, *Stare Decisis*, 49 Colum.L.Rev. 735, 736 (1949). Or as the Court itself has said: "[W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions." *Smith v. Allwright*, 321 U.S. 649, 665, 64 S.Ct. 757, 765, 88 L.Ed. 987 (1944).
>
> *South Carolina v. Gathers*, 109 S.Ct. 2207, 2218 (1989)(Justice Scalia dissenting).

The other viewpoint is that of some of the Supreme Court's harshest critics, comparing Supreme Court justices to "high priests" and comparing perpetuating error to religious orthodoxy:

> It is one of the essential weaknesses of the Government by Judiciary that, as in all theocratic governments, based upon the sole power to expound a sacred text, its priests cannot afford to admit error without undermining the power of the priesthood and upsetting the form of government in which they are the ruling caste. Error must therefore be perpetuated, no matter what the consequences. For to those who believe in that form of government, that form of government is of much more

> importance than the alleged sacred text upon the exposition of which it is supposed to be based.
>
> Louis B. Boudin, *Government by Judiciary*, Vol. II, pages 287-288 (1932).

In recent years, as the relatively quick correction of *Grady v. Corbin*, 110 S. Ct. 2084 (1990) by *United States v. Dixon*, 113 S.Ct. 2849 (1993) proves, the latter viewpoint has, apparently, been discredited.

This viewpoint is further reinforced in Segal and Spaeth, *The Influence of Stare Decisis on the Votes of the United States Supreme Court Justices*, 40 American Journal of Political Science 971 (1996) (Results: Overwhelmingly, Supreme Court justices are not influenced by landmark precedent with which they disagree. We replicate the research for nonlandmark decisions and find similar results).

In recent years the holdings in *Mastushita Elec. Indus. Co. v. Zenith Radio*, 106 S.Ct. 1348 (1986), *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986), and *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986) have allowed the lower courts almost unbridled discretion in the denial of jury trial to American citizens and foreign nationals alike.

Matsushito, supra, was instrumental in practically destroying an American industry as well. Entries from various newspaper indexes under "Zenith Electronics Corp." illustrate part of what *Matsushita* failed to correct.

> . . . GE's decision [to abandon production of color televisions in US] leaves Zenith the last major American manufacturer of televisions (L), Jl 24,IV,4:3
>
> *New York Times Index 1987*, p. 1393

> . . . shipped nearly 1,500 jobs to Mexico in 1992 . . . says another 300 workers will lose their jobs in next year. . . plant in Springfield, Mo, which once had 4,000 workers, will be left with only about 50 employees (S), Ja 29,I,37:1
>
> *New York Times Index 1994*, p. 1278
>
> Despite a growing economy, year-end layoffs come thick and fast at some companies. . . . and troubled television maker Zenith Electronics Corp plans 1,200 cuts. (S) D 24 - A, 1:5
>
> *The Wall Street Journal Index - Corporate News 1996*, p. 1097
>
> . . . company has reported loss every year but one since 1985 (S), S 6,I,40:2.
>
> *New York Times Quarterly Index, Jul-Sep 1997*, p. 413

Celotex Corp., supra, may have been diluted by this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), as illustrated by the decision in *In re Joint Eastern and Southern Dist. Asbestos Lit.*, 52 F.3d 1124 (2nd Cir. 1995).

To view the errors in the foregoing trilogy of cases it is first necessary to review and summarize the dissents in those three cases:

> The Court's opinion today, far from identifying reversible error, only muddies the waters. In the first place, the Court makes confusing and inconsistent statements about the appropriate standard for granting summary

> judgment. Second, the Court makes a number of assumptions that invade the factfinder's province. Third, the Court faults the Third Circuit for nonexistent errors and remands the case although it is plain that respondents' evidence raises genuine issues of material fact.
>
> *Matsushita*, supra, at 1362 (Justice White dissenting).

> The Court today holds that "whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case," *ante*, at 2514. In my view, the Court's analysis is deeply flawed, and rests on a shaky foundation of unconnected and unsupported observations, assertions, and conclusions. Moreover, I am unable to divine from the Court's opinion *how* these evidentiary standards are to be considered, or what a trial judge is actually supposed to do in ruling on a motion for summary judgment.
>
> *Anderson*, supra at 2515 (Justice Brennan, dissenting)(footnote omitted).

Ironically, this is the *same* Justice Brennan who *authored* *New York Times v. Sullivan*, 84 S.Ct. 710 (1964) that the majority *relied on* in *Anderson*.

> The Court, apparently moved by concerns for intellectual tidiness, mistakenly decides that the "clear and convincing evidence" standard governing finders of fact in libel cases must be applied by trial courts in deciding a motion for summary judgment in such a case. The Court refers to this as a "substantive standard," but I

thin' it is actually a procedural requirement engrafted ont. Rule 56, contrary to our statement in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984), that

> "[w]e have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." *Id.*, at 790-791, 104 S.Ct., at 1487-1488.

The Court, I believe, makes an even greater mistake in failing to apply its newly announced rule to the facts of this case. Instead of thus illustrating how the rule works, it contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never cooked before and has no intention of starting now.

Anderson, supra, at 2520-2521 (Justice Rehnquist dissenting).

The Court clearly rejects the ruling of the Court of Appeals that the defendant must provide affirmative evidence disproving the plaintiff's case. Beyond this, however, the Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the nonmoving party cannot prove its case. This lack of clarity is unfortunate: district courts must routinely decide summary judgment motions, and the Court's opinion will very likely create confusion.

Celotex Corp., supra, at 2556 (Justice Brennan dissenting)(footnote omitted).

Which is *exactly* what has happened in legions of lower court cases.

> In light of the District Court's plain error, therefore, it is perfectly clear that, even after this Court's abstract exercise in Rule construction, we should nonetheless affirm the reversal of summary judgment on that narrow ground.
>
> *Celotex Corp.*, supra, at 2561 (Justice Stevens dissenting)(footnote omitted).

For a treatment of the above trilogy of Supreme Court decisions as equally harsh as the quoted dissents, supra, see Issacharoff and Lowenstein, *Second Thoughts About Summary Judgment*, 100 Yale Law Journal 73 (1990) and McFadden, *Trial by Summary Judgment? Erosion of the Seventh Amendment*, Trial p. 64 (July 1996). McFadden pointed out that "The analytical quagmire Justice William Brennan predicted in his dissent . . . has been realized." *Id.* at 66.

Other courts have made equally uncomplimentary observations concerning summary judgment and the issues it raises.

> The Court here re-examines testimony offered in a common law suit, weighs conflicting evidence, and holds that the litigant may never take this case to a jury. The founders of our government thought that trial of fact by juries rather than by judges was an essential bulwark of civil liberty. For this reason, among others, they adopted Article III, § 2 of the Constitution, and the Sixth and Seventh Amendments. Today's decision marks a continuation of the gradual process of judicial

> erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.
>
> *Galloway v. United States*, 63 S.Ct. 1077, 1090 (1943)(Justice Black dissenting)(footnote omitted).

How that guarantee has since been dishonored over a period of two centuries is ably discussed on pages 1091-1096, *id.*

> [T]he court errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue and renders judgment thereon.
>
> *Slocum v. New York L. Ins. Co.*, 33 S.Ct. 523, 532 (1912).

This is what was done in the present case.

See also *Capital Traction Co. v. Hof*, 19 S.Ct. 580 (1899); *Baylis v. Travelers' Ins. Co.*, 5 S.Ct. 494 (1885); *Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171, 183 (3rd Cir. 1992).

A district court judge penned his observations of summary judgment four years before the *Matsushita* trilogy was decided:

> Summary judgment is an extreme and treacherous remedy, not to be entered unless movant has established its right to judgment with such clarity as to leave no room for controversy and unless the other party is not entitled to recover under any set of discernible circumstances. Summary judgment is notoriously inappropriate for the determination of claims in which

issues of intent, good faith and other subjective feelings play dominant roles.

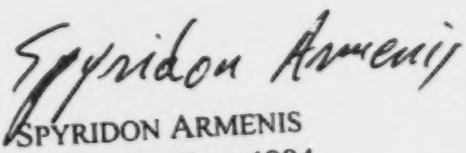
Croxen v. U.S. Chemical Corp. of Wisconsin, 558 F.Supp. 6, 7 (N.D. Iowa W.D. 1982)(citations omitted).

Courts grasp at thin air when they search for reasons why *stare decisis* must be an intrinsic good. Worse, they disserve justice; they bind themselves and the future to the missteps and wrong turns of an imperfect part. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 Yale Law Journal 2031 (1996).

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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